REGISTERED No. D. 221

The Gazette of India

EXTRAORDINARY

PART II—Section 3—Sub-section (ii)

PUBLISHED BY AUTHORITY

No. 115] NEW DELHI, THURSDAY, JUNE 26, 1958/ASADHA 5, 1880

ELECTION COMMISSION, INDIA

NOTIFICATION

New Delhi-2, 23rd June 1958/Asadha 2, 1880 (Saka)

S.O. 1249.—In continuation of Election Commission's notification No. 82/427/57/770 dated the 6th January, 1958, published in the Gazette of India, extraordinary dated the 14th January, 1958, under section 106 of the Representation of the People Act, 1951 (43 of 1951), the Election Commission hereby publishes the judgment of the High Court of Judicature for Rajasthan Jaipur Bench delivered on the 3rd April, 1958, on appeal filed by Shri Hatilal S/o Shri Kallan Singh M.L.A., Pleader, Bharatpur against the order dated the 5th December, 1957, of the Election Tribunal Jaipur in the Election Petition No. 427 of 1957.

IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JAIPUR

JUDGMENT

Hoti Lal Vs. Shri Raj Bahadur.

Civil Miscellaneous First Appeal No. 5/1958 against the judgment of Shri Kartarsingh Campbellpuri, Member Election Tribunal, Jaipur dated 5th December, 1957 in Election Petition No. 427/1957.

Date of Judgment:—3rd April, 1958.

PRESENT

The Hon'ble the Chief Justice Mr. K. N. Wanchoo.
The Hon'ble Mr. Justice D. M. Bhandari.
Mr. R. C. Sharma—*for the appellant.*
Mr. K. L. Mishra, Advocate General U.P.,
Mr. C. L. Agarwal, Mr. S. S. Shukla, Mr. V. P. Tyagi,
Mr. A. S. Chaturvedi and Mr. B. L. Baid—*for the respondent.*

By the Court (Per Hon. Wanchoo. C. J.)

This is an appeal by Shri Hotilal under section 116A of the Representation of the People Act (No. 43 of 1951) hereinafter called the Act, against the judgment of the Election Tribunal, Jaipur, rejecting the election petition filed by him against Shri Raj Bahadur, who was elected from Bharatpur Parliamentary Constituency.

The appellant is an elector in the constituency. He did not stand for election, but he filed the election petition against the successful candidate on two main grounds:—

(1) That the nomination paper of a candidate Shri Mukat was wrongly rejected by the Returning Officer.

(2) The Returning Officer had committed an illegality in treating Shri Hansraj, who was one of the nominated candidates, as properly retired under Section 55A of the Act.

It was urged that on account of these two defects, the result of the election had been materially affected and the election of Shri Raj Bahadur was void.

The application was opposed by Shri Raj Bahadur. His case was that the nomination paper of Shri Mukat was rightly rejected and that Shri Hansraj was properly treated as a retired candidate under section 55A of the Act. It was also contended that the applicant had failed to prove that the result of the election had been materially affected by treating Shri Hansraj as a retired candidate. Besides these points, it was also urged on behalf of Shri Raj Bahadur that section 117 of the Act was not properly complied with so far as the deposit of security was concerned and the election petition should have been thrown out on that ground. Thus, these four points require decision in this appeal.

We shall first take the point regarding the deposit of security. This matter has been considered at length by the Tribunal. We do not think it necessary to repeat all that the learned Tribunal has said. It is enough to say that the deposit of security of Rs. 1,000 was actually made on the 1st of May, 1957 and the receipt granted by the Bank of Jaipur on behalf of the Treasury was filed along with the election petition. The receipt was in favour of the Secretary to the Election Commission, New Delhi. Thus section 117 was, in our opinion, substantially complied with and we agree with the learned Tribunal that the arguments which were urged before it to show that this deposit was not in accordance with section 117 were mere technicalities which did not touch the substantial question. The election petition, therefore, could not be dismissed on the ground that section 117 had not been complied with.

The next question to which we address ourselves is with respect to Shri Hansraj. The facts in this connection are briefly these. Shri Hansraj stood for election and his nomination paper was accepted. The date of the election was 25th of February, 1957. On the 15th of February, 1957, Shri Hansraj gave a notice as required under section 55A that he was retiring from the contest. Therefore the Returning Officer did not place any ballot box for him at the actual election on the 25th of February, 1957. Now the contention of the appellant in this connection is that Shri Hansraj did not retire in time as required by sub-section (2) and, therefore his ballot box should have been placed for the voters to cast their votes when the actual election took place on the 25th of February. Sub-section (2) of section 55A, with which we are concerned here, is as follows:—

> "(2) A contesting candidate may retire from the contest by a notice in the prescribed form which shall be delivered to the returning officer between the hours of eleven O'clock in the forenoon and three O'clock in the afternoon of any day not later than ten days prior to the date or the first of the dates fixed for the poll under clause (d) of section 30 either by such candidate in person or by an agent authorised in this behalf in writing by such candidate.

The language used in this sub-section is rather inelegant, for it lays down that the contesting candidate may retire from the contest between certain hours of any day not later than ten days prior to the date or the first of the dates fixed for the poll. The applicant's contention is that this means that the retirement should take place ten clear days before the first date of election. If the sub-section is so interpreted, Shri Hansraj could have retired only upto the 14th of February and, therefore, his notice of retirement on the 15th of February was beyond time, as contemplated by sub-section (2). We are of however opinion that there is no force in this contention. It should be noted that sub-section (2) does not mention ten clear days, nor does it say that the notice of retirement shall be given at least so many days before or not less than so many days before. The provision is that the notice shall be given between certain hours of any day not later than 10 days prior to the first date of election. We have to interpret this provision and in doing so, let us omit the words "not later than" from consideration. The sub-section will then read that a contesting candidate may retire from the contest between certain hours of any day ten days prior to the first date of election. Now in order to arrive at ten days prior to the first date of election, all that one has to do is to subtract ten from the date of election. Here the first date of election was the 23rd. Subtracting ten from that, we arrive at the 15th. Therefore, ten days prior to the first date of election in this particular case would be the 15th of February. Now suppose, the words were "one day prior to the first date of election" and the date of election was 25th. It is in our opinion too obvious that one day prior to the date of election would mean the 24th of February and not the 23rd which seems to be the contention of the appellant. 23rd would be two days prior to the election. Therefore, when we have to find out a day which is ten days prior to the election, we can arrive at it by subtracting ten

days from the date of election. Where, for example, the date of election is 3rd of February, in order to make this subtraction we have to add 31 for the month of January, making 34. From that we subtract ten and arrive at the 24th of January as the date which is ten days prior to the date of election. Therefore, the day which is ten days prior to the election is the 15th of February in this case. Now let us turn to the implication of the words "not later than" which we have omitted upto now. The implication of these words is that the notice of retirement cannot be given on any day later than the day thus arrived at. This means that it can be given upto that day, but not after that day. In this case, the notice was given on the 15th which was ten days prior to the first date of election. It could be given upto that day and if so given, it would not be later than that day. We are, therefore, of opinion that the Returning Officer was right in treating Shri Hansraj as having properly retired under section 55A(2) and in not putting his ballot box on the actual date of election. The Tribunal was right, therefore, in its decision on this point.

The next point is about the rejection of the nomination paper of Shri Mukat. Shri Mukat is a lawyer in Bharatpur and was also acting as Oath Commissioner under Rule 69 of the General Rules (Civil) 1952. The Returning Officer rejected the nomination paper on the ground that Shri Mukat was holding an office of profit under an appropriate government and was therefore disqualified under Article 102 of the Constitution. It is urged that this decision was incorrect and as the nomination paper was wrongly rejected, we should set aside the election. In such a case, the result was bound to be materially affected. The learned Tribunal has held that Shri Mukat was holding an office of profit either under the Government of India or Government of a State and his nomination paper was therefore rightly rejected. The relevant portion of Article 102(1) with which we are concerned is this:—

> "A person shall be disqualified for being chosen as, and for being, a member of either House of Parliament—
>
> (a) if he holds any office of profit under the Government of India or the Government of any State, other than an office declared by Parliament by law not disqualify its holder;"

Some argument seems to have been addressed on the basis o fthe definition of the words "appropriate Government" in section 9 of the Act. It is enough to say that definition cannot control Article 102 of the Constitution.

That definition has been provided because of certain provisions made by Parliament in conformity with Article 102 (1)(e) in section 7 of the Act relating to contractors and directors or managing agents of companies etc. *vide* section 7(d) and (e). It is in that connection that the words "appropriate Government" as defined in section 9 come into play. They cannot control Article 102 which lays down that a person shall be disqualified for being chosen as a member of either House of Parliament if he holds any Office of profit, be it under the Government of India or the Government of a State. The question, therefore, that arises is whether Shri Mukat held an office of profit either under the Government of India or the Government of Rajasthan in this case.

Before we consider whether the office of an Oath Commissioner is an office of profit under the Government of India or the Government of any State, we should like to dispose of one objection, namely that Shri Mukat was not in fact performing the duties of an Oath Commissioner on the date on which he filed his nomination paper. It is enough to say that we agree with the learned Tribunal that Shri Mukat was in fact performing the duties of an Oath Commissioner at the relevant time. The District Judge made the order and appointment on the 4th of January, 1957, but it was to come into force from the 1st of January, and Shri Mukat acted in fact throughout the whole of January. The District Judge also asked for an undertaking from all Oath Commissioners and this undertaking seems to have been given later sometime after the date of the scrutiny of nomination papers. But even that would not make any difference as Shri Mukat actually acting as Oath Commissioner from before and as soon as he gave the undertaking even later, his appointment would become perfect. We are, therefore, of opinion that Shri Mukat was in fact working as an Oath Commissioner at the relevant time and the delay in giving the undertaking would make no difference to this.

Then we come to the main question whether an Oath Commissioner can be held to be holding an office. On that point, there was no serious contest by the appellant and it was practically conceded that the Oath Commissioner is an office.

The word "office" has not been defined anywhere. But there are certain well accepted criteria for determining whether there is an office in existence or not. These criteria are:—

(1) That the office should be independent of the person holding it, meaning thereby that the office must exist even if the person is not there.

(2) The office cannot be assignable or heritable.

(3) That there should be a relation of master and servant between the government on the one hand and the person holding the office on the other, and

(4) that it must be for a specified period.

We are of opinion that so far as an Oath Commissioner is concerned, all these characteristics of an office are present. The office of the Oath Commissioner exists whether there is any person actually oppointed to it or not, for the practice is that in every court, certain number of Oath Commissioners is to be appointed. though in actual fact, the place might be vacant. The office also is not assignable or heritable. There is also in a sense relationship of master and servant between the government and the person holding the office inasmuch as the Oath Commissioner has to follow the direction, if any, of the District Judge and act according to the rules. The office is certainly for a specified period. We are, therefore, of opinion that the Oath Commissioner holds an office.

Our attention in this connection was drawn to certain cases of Election Tribunals where an assesor under the Criminal Procedure Code was held not to hold an office of profit. It is quite clear to our mind that the case of an assessor is different altogether from the case of an oath commissioner. In the first places, an assessor has to perform a duty laid on all citizens by the Criminal Procedure Code. In the second place, an assessor works as such only during the time he sits with the court and thereafter he has no official position, while an oath commissioner can work any time even outside court hours during the term of his appointment. We have, therefore, no doubt that an oath commissioner holds an office.

The next question is whether this is an office of profit. On that point, we do not think that much argument is required. Oath commissioner charge certain fees for verifying affidavits and these fees bring them income. In the case of Bharatpur, there is evidence that the income of an oath commissioner is roughly Rs. 50 per month. Thus the office of the oath commissioner brings a profit to the holder thereof and it must be, therefore, held to be an office of profit. The fact that there is no fixed pay for the office is immaterial. So long as profit arises by fees or by commission to the holder of an office, the office will be an office of profit. We have, therefore, no hesitation in coming to the conclusion that the office of the oath commissioner is an office of profit.

Then comes the question whether this is an office of profit under the Government of India or the Government of any State. The argument in this connection is that the words "Government of India or the Government of any State" in Article 102 refer to the executive government and it is only an office of profit under the executive government which disqualify a person. It is also urged that this is an office at the best under the judicial department and the judicial department is not, while working as such, under the executive government, for the judiciary in our Constitution is independent and, therefore, this is not an office of profit under the Government. We are of opinion that this argument also has no force. If this argument were to be accepted, it would lead to obviously absured results. According to this argument, a High Court Judge, for example, would be entitled to stand for election to Parliament or to a State legislature because he would be held not to be holding an office of profit. We are of opinion that the words "Government of India or the Government of any State" must be interpreted in their widest import in Article 102 and would thus include judicial office or office under the judicial Department as office under the Government of India or the Government of a State. We may go further and add that even an office held under the legislature, as for example, the Secretary to a legislature or clerks working in the office of a legislature would also be holding office of profit under the Government of India or the Government of a State. The word "Government" used in this Article must be read widely to include all the three functions of government namely, executive, legislative and judicial and an office of profit held under any of the three branches of government would be an office under the Government of India or the Government of a State. This of course excludes the legislators

themselves, for it would be another absurdity to hold that because the legislators are paid certain allowances or members of the cabinet or speakers of Parliament or Legislative Assemblies are paid certain salaries, they are disqualified from being members of Parliament or State Legislatures. From the very nature of things, this will have to be excluded and such others as Parliament may by law exclude as provided in Article 102(1)(a) itself. We are, therefore, of opinion that the office of an oath commissioner is an office of profit under the Government of Rajasthan.

Our attention in this connection was drawn to Abdul Shakur *v.* Rikhab Chand and another (1) that was, however, a case in which the person holding the office was under a statutory committee, namely the Durgah Khwaja Committee, Ajmer. It is true that in that case the committee was appointed by the Central Government which had also the power to supersede it; but the committee was statutory body corporate having perpetual succession and common seal and which could sue and be sued through its President. In these circumstances, the Supreme Court held that a teacher in a school managed by the Committee did not hold an office of profit under the Government of India. The facts of that case are entirely different. There a statutory corporate body intervened between the Government of India and the person holding the office of profit. In the present case, no such statutory body intervenes and as in our opinion, the judiciary is as much a part of government as the other two branches, namely the legislature and the executive, a person holding an office in the judiciary or under the judiciary of a State is as much under the government of the State as a person holding an appointment in the executive branch of the government or under it.

Lastly it was urged that there is conflict between section 139 of the Civil Procedure Code and Rule 69 of the General Rules (Civil) and that section 139 of the Civil Procedure Code will prevail and it was not open to the District Judge to appoint a lawyer as an Oath Commissioner under rule 69. We do not think it necessary for present purposes to decide whether there is really a conflict between section 139 of the Civil Procedure Code and Rule 69 of the General Rules (Civil). We will assume that there is such a conflict and section 139 of the Civil Procedure Code prevails and the District Judge could not in law appoint a lawyer as an Oath Commissioner under rule 69 of the General Rules (Civil). But even if this be so and the appointment of Shri Mukat was in this respect irregular, that would not save him from the disqualification under Article 102. As we read that article, it provides for disqualification of any person who holds any office of profit. The disqualification arises from the fact of holding an office of profit under the Government of India or the Government of a State even if there is some defect, legal or otherwise, in the order making the appointment. The intention behind Article 102 is to debar all *de facto* holders of office of profit under the Government of India or the Government of any State. If this were not so, a person who may be actually holding an office of profit under the Government will not be disqualified if there was some defect, legal or otherwise, in his order of appointment. What Article 102 in our opinion, emphasises is the holding of office in fact and the defect in any order of appointment relating to the holder of an office would not, in our opinion, make any difference. So assuming that there was some defect in the order of appointment of Shri Mukat, he would still, in our opinion, be a person who held an office of profit under the Government of Rajasthan and would, therefore, be disqualified under Article 102.

The last point that was urged was with respect to the retirement of Shri Hansraj. It was said that if the retirement of Shri Hansraj was not within the time allowed by section 55A, the case would amount to the same thing as if his nomination paper was wrongly rejected and there will be generally speaking a presumption that the result of the election was materially affected and it will not be necessary for the appellant to prove that the result was in fact affected. The case of the appellant in this connection was that about ten to fifteen thousand voters came to vote for Shri Hansraj and voted for Shri Raj Bahadur because no ballot box of Shri Hansraj was placed by the Returning Officer for the voters to put their votes in it. The applicant was unable to prove this case. Therefore, learned counsel has fallen back on the argument that if Shri Hansraj's retirement was not within time, the effect would be the same as if his nomination paper was rejected. We are of opinion that there is a great difference between a case of the rejection of a nomination paper and the case of a candidate who has retired,

(1) A.I.R. 1958 Supreme Court 32.

but not within time. This point does not actually arise in view of our decision that Shri Hansraj had given notice of his retirement within time and we need not pursue it at length. It is enough to say that where a candidate's nomination paper is rejected, he is denied the opportunity of standing for election and is also denied the opportunity of canvassing for votes. But where a candidate retires of his own free will, though it may not be within time, he is not denied an opportunity of standing for election and canvassing for the votes by any action of the Returning Officer. He by giving notice of retirement, even though it be beyond time, denies the opportunity to himself. Such a case cannot be equated to the case of the wrong rejection of a nomination paper and in such a case we feel that it will have that it will have to be proved specifically that the result of the election was materially affected. However, as this point does not arise in view of our decision that Shri Hansraj's notice of retirement was in time, we need not pursue the matter further.

There is no force, therefore, in this appeal and it is hereby rejected with costs.

(Sd.) K. N. W.

(Sd.) D. M. B.

[No. 82/427/57/12364.]

By Order,

A. S. NADKARNI, Under Secy.

PRINTED IN INDIA BY THE GENERAL MANAGER, GOVT. OF INDIA PRESS, NEW DELHI AND PUBLISHED BY THE MANAGER OF PUBLICATIONS, DELHI, 1958